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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 907

UNITED STATES OF AMERICA,
Respondent,

vs.

JAMES D. IRVING,
Petitioner.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DANIEL D. GLASSER
134 N. La Salle St.
Chicago, Ill.
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 8-6881

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

James D. Irving, petitioner, prays that a writ of certiorari be issued to review the decree of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on February 12th, 1957, affirming the judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW.

The trial court filed no opinion. The opinion of the Court of Appeals has not yet been published. It appears in the appendix of this petition. (pp. 27-29).

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was entered on February 12th, 1957 (p. 30). Petitioner filed a petition for rehearing which was denied on March 14th, 1957 (p. 30). The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, and Rule 19 of the Rules of this Court.

QUESTIONS PRESENTED.

1. Whether the trial court did not abuse its discretion in overruling the affidavit of bias and prejudice filed by the defendant and thereby invaded the rights of the defendant guaranteed him by the Fifth Amendment.

2. Whether the denial of the motion to dismiss on the ground that the term of the Grand Jury had expired and that it was without authority to return an indictment against this defendant, was not an obvious violation of the rights of the defendant under the Fifth Amendment.

3. Whether the failure of the Government to sustain its burden did not deprive the defendant of the benefit of the presumption of innocence.

4. Whether the lack of proof of a "likely source" of alleged increase in "net worth" did not render the proof insufficient under the standards established by this Court.

5. Whether failure of the prosecution to "track down" relevant leads furnished by the defendant does not call for this Court to exercise its prerogative to declare the evidence insufficient to convict.

6. Whether the admission into evidence over objection and submission to the jury of a "summarizing chart" which was admittedly inaccurate was not such a deviation from the usual rules of procedure and guarantee of a fair trial as to require a reversal of this case.

7. Whether the denial of defendant's motion for judgment of acquittal was not an abuse of discretion by the trial Judge.

STATUTES INVOLVED.

United States Code, Title 28, Sec. 144.

Rule 6 Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

James D. Irving, during the year 1952 was married and living with his wife and five children in Chicago (App. 49). During 1952 he derived his income from The Panama Finance Company, the Irving Music Company and speculations (App. 49-50).

The defendant had prior to the year in question been engaged in operating a policy wheel (App. 57). An act of Congress in 1951 required the operator of a policy wheel to purchase a tax stamp. Since the defendant did not wish to purchase a stamp and because he desired to go into another business, he and many like him in the policy business, ceased their operations in the early Fall of 1951 (App. 196). Prior to going out of the policy business the defendant discussed with another policy operator, one John Mays, now deceased, the possibility of starting a new and legitimate partnership (App. 196). It was agreed between the defendant and the said John Mays that they would go into the finance business. Mays gave the defendant $150,000.00 (App. 196-197) as his contribution toward the new partnership. This money was used by the defendant to establish the Panama Finance Company into which during the year 1952 he invested the above sum. The Government now complains that this $150,000.00 was taxable income of the Defendant.

The Panama Finance Company kept a regular set of books which were taken care of by a bookkeeper (App. 147) and regularly audited by a well known firm of certified public accountants (App. 117). The books reflected accurately the fact that the money in question was invested in 1952 in the Panama Finance Company (App. 128). The personal records of the defendant were not as well kept as the prosecution thought they should have been.

The prosecution was commenced on August 8th, 1955, by the return of an indictment, by the Grand Jury for the January, 1955 term, in one count alleging a violation of section 145 (b) of the Internal Revenue Code. That count charged the defendant with willfully attempting to defeat and evade a large part of the income tax due and owing by him and his wife to the United States for the year 1952, by filing a joint return for that year showing $17,921.32, whereas, the indictment alleged the defendant well knew there was $157,526.72 due.

The defendant filed an affidavit of prejudice and moved that Judge Campbell disqualify himself. This motion was denied.

The defendant subsequently moved to dismiss the indictment which motion was denied.

A motion for judgment of acquittal was filed by the defendant at the close of the Government's case and another at the close of all evidence. Both the foregoing motions were denied. The jury returned a verdict of guilty.

Defendant filed motions for new trial, judgment notwithstanding the verdict, and in arrest all of which were denied.

The defendant was sentenced to a term of three years.

REASONS FOR GRANTING THE WRIT.

I.

The Affidavit Of Bias And Prejudice Should Have Been Sustained.

Under authority of Section 144, Title 28, United States code, the defendant James D. Irving filed an affidavit alleging that the trial judge, Honorable William J. Campbell, had a personal bias and prejudice against him (App. 14).

The prime requisites of such an affidavit are,

1. Timeliness
2. Sufficiency
3. Certificate of counsel

The affidavit was filed on August 18th, 1955. The defendant was not called upon to plead to the indictment until almost five months later.

The affidavit alleges that defendant's counsel had been retained to represent him some time before the return of the indictment and long before the case had been assigned to Judge Campbell. It also states that the defendant believes that Judge Campbell has a personal bias and prejudice against him by reason of the fact that Daniel D. Glasser is his attorney. The affidavit further alleges that Judge Campbell has, "stated his prejudice against my attorney, Mr. Glasser, in open court and has further stated that Mr. Glasser would never be permitted to try a case before him".

There is of course no question as to the timeliness of the affidavit.

There is a certificate in proper form signed by the Attorney for the defendant in accordance with the above statute.

So far as the sufficiency of the affidavit is concerned, the District Attorney made no motion to strike. Under the statute it is the duty of the trial judge to disqualify himself and to take no further part in the proceedings, if the affidavit is sufficient. In this case the trial judge merely referred the affidavit to the Executive Committee of the court which consisted of two judges who denied the motion that Judge Campbell disqualify himself (App. 16). There is no provision in the statute giving authority for this latter hearing.

Amendments 5 and 6 of the Constitution of the United States guarantees that the defendant shall not be deprived of his liberty without due process of law and that he shall have the right to assistance of counsel in his trial.

The defendant had chosen Mr. Glasser as his counsel long before the indictment, and of course, Mr. Glasser had accepted the case long before anyone knew that the cause woud be assigned for trial before Judge Campbell. The confidence of the defendant in Mr. Glasser, and his great desire to have him as his counsel, is demonstrated by the fact that he, after being fully advised in the matter, executed the affidavit.

The right to assistance of counsel has been carefully guarded by our courts throughout our history, and means, we are sure, the right of a defendant to have the assistance of counsel of his own choice.

To precisely measure the degree of prejudice, if any, suffered by the defendant is impossible. To do so in determining the correctness of the decision below would be to beg the constitutional question. Our courts have long recognized that the fundamental rule of fairness guaranteed by the Constitution with regard to procedure in the course of judicial inquiry, including criminal trials, may not be disregarded by reason of the degree of prejudice which may be shown in a particular case. *Tummey* v. *Ohio*, 273 U.S. 510, 535; *Patton* v. *United States*, 281 U.S. 276, 292. The same principle is more fully stated by Mr. Justice Roberts in his dissent in *Snyder* v. *Massachusetts*, 291 U.S. 97, 136-137, where, while there was disagreement as to the existence of the asserted constitutional right, there was no division as to the principle here invoked.

Berger v. *U. S.*, 255 U.S. 22, (1920) is a decision of this Supreme Court on three questions certified to it by the Court of Appeals for the Seventh Circuit, all in connection with an affidavit of bias and prejudice.

This Court held, (pp. 32-33):

> " • • • whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the Judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such Judge shall proceed no further therein but another Judge shall be designated . . . to hear such matter. There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by a certificate of counsel, directs an immediate cessation of action by the Judge whose bias or prejudice is averred, and in his stead, the desig-

nation of another Judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one Judge is emphasized by the requirement of the designation of another."

The following chart, setting forth the above-mentioned certified questions in the left hand column and the answer of this Supreme Court in a parallel column will conclusively demonstrate the strength of our position;

Question 1 (pp. 30) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a Judge?	Answer (pp. 36) "Yes, that is, that the affidavit of prejudice is sufficient to invoke the operation of the act."
Question 2 Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?	"To the second we answer that, to the extent we have i n d i c a t e d, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit."
Question 3 Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge have lawful right and power to preside as Judge on the trial of plaintiffs in error upon said indictment?	"To the third we answer, No, that is, that Judge Landis had no lawful right or power to preside as Judge on the trial of defendants upon the indictment".

We feel that under the law the trial judge, Honorable William J. Campbell had an obligation to determine the timeliness, and the sufficiency of the affidavit both as to form and content. The obligation we feel was his and his

alone. There is no right or authority in the statute for a trial judge to reassign a case to the Executive Committee of his court merely for it to look into the merit of the affidavit.

A defendant who has chosen an attorney to represent him should if possible be permitted to be represented by that attorney. The relationship of attorney and client—particularly in a criminal case where the liberty of the defendant is at stake—is such that the defendant will feel his best interest protected if he is permitted the representation of an attorney of his choice. In this case as set forth in the affidavit the defendant felt that his rights would be prejudiced if his counsel were required to try the case before a judge who had expressed an animosity to the attorney.

II.

The Denial Of The Motion To Dismiss On The Ground That The Grand Jury Was Without Authority Was An Obvious Invasion Of The Rights Of The Defendant Guaranteed By The Fifth Amendment.

The defendant in apt time filed his motion to dismiss the indictment on the ground that the Grand Jury which returned the same was without authority so to do (App. 17).

The order impaneling the Grand Jury which returned the indictment in this case is as follows:

"Grand Jury for the January 1955 Term."

The indictment in this case was returned on August 8th, 1955, which was some 7 months after the expiration of the January Term.

Of course had the court merely impanelled a Grand Jury in January 1955 it could have continued to function for 18 months. However, having been impanelled specifi-

cally as "Grand Jury for the January 1955 Term" its authority ceased,—unless properly extended—at the end of the January Term. No motion to extend was ever made.

Ordinarily the "tenure and powers of a Grand Jury are not affected by the beginning or expiration of a term of court". However, in this case a Grand Jury was impaneled for *the January* 1955 *Term,* therefore it could not function after that unless a specific order authorizing it to do so was entered.

The word, "the" is defined as follows, 86 Corpus Juris Secundum 655, 656:

> "THE. A definite article; a definitive, or more particularly a definitive demonstrative, adjective, used especially or chiefly before a noun to particularize, individualize, specialize, or generalize its meaning, and having a force which thus distinguishes it from the indefinite distributive force of 'a' or 'an' and from the abstract force of the unqualified noun.
>
> The term may be employed to designate one particular from a class or number, disassociating it from others of the same class, and it has been said that it determines what particular thing we are to assume to be meant, and that it directs what particular thing or things we are to take or assume as spoken of."

The doctrine of *expressio unius est exclusio alterius,* which is used to interpret statutes may well apply here. "The expression of one excludes others".

"The" is the word used before nouns, with a specifying or particularizing effect opposed to the indefinite or generalizing force or "a" or "an". *United States* v. *Hudson,* 65 F. 68, 71. *Lowry* v. *City of Mankato,* 231 Minn. 108, 115.

In *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, the positions were reversed and there the government argued in effect as we do here that the word "the" is a word of limitation.

A good definition of the word "term" is given by the court in *Parrott* v. *Wolcott,* 75 Neb. 530, 533.

> " • • • While the word 'term' is defined as, 'The time in which a court is held or is open for the trial of causes.' This is Bouvier's definition also. In Black Law Dictionary, it is said: 'The word "Term" when used with reference to a court, signifies the space of time during which the court holds a session'."

Using the above definition of the word "term" as a space of time during which the court holds its session it must be admitted that the January "space of time" had long expired and had not been extended. Therefore it is respectfully urged that the indictment was returned long after the authority of the Grand Jury had expired, without due process of law as required by the Fifth Amendment.

III.

The Failure Of The Government To Sustain Its Burden Requires Reversal Of This Case.

The Supreme Court after many years and a great number of cases has finally evolved a program of judicial conduct in the trial of "net worth" cases. That program is carefully set forth in the recent decision of *Holland* v. *United States,* 348 U.S. 121. We have used that case in presenting our argument as to the presentation of the case to the jury.

This case points up all the dangers of a net worth prosecution. It vindicates the caution with which this Court has admonished Courts to proceed.

In the case at bar, the defendant Irving and one Robert Mays had for one reason or another determined to go out of their illegitimate business and into a legitimate one. They had agreed together on the method of handling the original investment. Robert Mays gave Irving $150,000. to invest in the partnership venture. Irving invested that money in the venture (App. 196).

To deny the truth of the above statements would be to enter into the realm of pure conjecture and speculation. There is not a scintilla of evidence to overcome the facts as stated and which were related to the agent and to the assistant U. S. Attorney General by the defendant Irving.

Here then is the first "pitfall inherent" in this type of prosecution. The evidence of the defendant's innocence is willy nilly not to be believed but the inference of the prosecution is of greater weight and therefor true. In the *Holland* case (*Holland* v. *U. S.*, 348 U.S. 121, 129) this Court seemed almost to have a case such as this in mind when it said:

> "While we cannot say that these *pitfalls inherent* in the net worth method foreclose its use, *they do require the exercise of great care and restraint* • • • Appellate Courts should review the cases bearing in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." (Emphasis added.)

In sanctioning the "net worth" prosecution this Court has recognized the "great danger" to the citizen. The Court, mindful of the dangers inherent in "net worth" cases advised:

> "trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution, to utilize is equally hard for the defendant to refute." *Holland* v. *U. S.*, 348 U.S. 121, 129.

In the instant case the prosecution called fourteen people to the witness stand. Eight of these witnesses merely identified records. One of the witnesses, (John Mayes) did not know the defendant Irving and gave testimony which was neither helpful to the prosecution nor the defense. One witness (Raggaber) was the Government's summary witness. The four remaining witnesses were Government Agents, Bierman and Taman, assistant U. S. Attorney General Hawley and Wilson, the accountant for the defendant.

Since the major part of the Government's case rests on the testimony of these four witnesses a narration and review of the testimony, which relates to the point here discussed, may be helpful to this Court.

Bierman's Testimony
(App. 193-200)

As a special agent for the Intelligence Section of the Internal Revenue Service I investigated the tax matters of the defendant Irving.

After I examined the books and records I had a conversation with the defendant and his attorney.

I showed the defendant his 1952 income tax return (Exhibit 1) and asked him if all the items—all shown on this return did represent all sources of income that he had. And he said, "Yes".

I asked him what the item "Speculations" on his return meant and what it was composed of.

He stated it represented wins from various forms of gambling, such as baseball, cards, etcetera. And I asked him if he had any records from which he could establish this figure. And he acknowledged "No", that it was pretty much a guess on his part.

I then advised him that the Government had knowledge of expenditures made by him which were in excess of the monies that he had at the beginning of the year, as was determined from the starting point that had been submitted, plus earnings reported by him for 1952.

He explained that he and several other policy figures wanted to enter legitimate businesses when the wagering tax law went into effect on November 1, 1951.

The taxpayer advised that one of these persons a Mr. Robert Mays advised that he would invest money with the defendant so that they might enter into some legitimate enterprise, but that this was to be kept only between the taxpayer and Mr. Mays. A few weeks prior to Christmas 1951 Mr. Irving was given $150,000.00 in cash by Mr. Mays for which Mr. Irving gave two receipts, one for $50,000.00 and another for $100,000.00. The defendant stated that all monies invested in the Irving Music Company was his own money, and the monies invested in the Panama Loan Company represented his own monies, and the balance of the monies left which he had received from Mr. Mays.

Hawley's Testimony
(App. 200-203)

Mr. Irving said that he had received $150,000.00 from a man named Mays who was then deceased, he had died some time previously. He said he had told the Internal Revenue agents about this man Mays giving him the $150,000.00, but he said they wouldn't believe that.

Taman's Testimony
(App. 220-223)

I was formerly an Internal Revenue agent and had conversations with the defendant Irving in which it was stated that the large deficiencies in the income tax investigation was money loaned from several individuals whose names

could not be mentioned, "because of the fact that he (Irving) may wind up in the alley dead."

Wilson's Testimony
(App. 84-105)

The item, "Speculations $37,450" in Exhibit 1 (1952 tax return) was a statement given to me by Mr. Irving. "I did not receive any supporting documents in regard to that item on speculations".

In analyzing the above, the weight to be given it, the burden of the Government and the constitutional safeguards we must first remember:

> "The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecution for other crimes" *Holland* v. *U. S.*, 348 U.S. 121.

The Government's case in a nut shell is:

> "We have shown that the defendant Irving had previously been a 'Policy Wheel' operator. He expended a large sum of money in 1952 in organizing the Panama Loan and the Panama Finance companies. This sum was in excess of his net worth plus his income for 1952. The defendant said the money was not his but belonged to Robert Mays. We do not believe him. He reported $37,000.00 of income for 1952 from, 'Speculations'. Although asked he produced no books to substantiate this latter item."

It is our contention that the testimony of the four witnesses narrated herein, taken either together or separately, do not prove, "every element of the offense beyond a reasonable doubt".

Protection of the revenue is of great importance to the people. However, we are constrained to say that the pro-

tection of the revenue is not of such paramount importance as to permit infringement of those inalienable rights so carefully enumerated in the Declaration of Independence and the Bill of Rights of our Constitution.

The burden of proof is not on the defendant. The Government cannot simply take the position that the statements of the defendant are incredible and therefore do not have to be overcome.

This Court has said, (*Holland* v. *U. S.*, 348 U.S. 121, 137-138):

> "Increases in net worth standing alone cannot be attributable to currently taxable income."

The defendant's statement that the bulk of the money is not his was in a rather nebulous way substantiated by the testimony of the Government witness Dellsy (App. 110-113).

The testimony shows that the defendant advised the government that the large sum of money which he put into the Panama Loan and the Panama Finance Company was received by him from Robert Mays. The testimony of the witness Dellsy (App. 110-112) indicates that in the purchase of an automobile for use in a personally owned company and during the year in question, the defendant Irving made the purchase on a deferred payment basis. The car was purchased by the defendant on January 10th 1952 for $1,933.21, at the end of the year the defendant still owed $485.38 on it. Certainly if he were possessed in his own right, of the bulk of the money herein complained of, he would have been able to pay cash for the car. The fact that the car was paid for on a deferred basis lends strength and support to the defendant's statement that the money he put into the finance and loan company was not his.

By what stretch of legal reasoning, especially in view of the narration of the testimony under this point, can the prosecution argue it has sustained its burden?

We conclude this portion of our argument by citing from, *The People* v. *Burke*, 313 Ill. 576, 582 (1924):

> "* * * the guilt of a person accused of crime cannot rest upon guess, surmise or speculation, but must be proven by evidence establishing beyond a reasonable doubt every material element of the crime alleged in the indictment."

IV.

The Failure Of The Prosecution To Prove A "Likely Source" Of Alleged Increase In Net Worth, Rendered The Proof Insufficient Under The "Net Worth" Theory.

The failure of the Government to prove either directly or by circumstantial evidence the likely source of the alleged increase in net worth vitiates its entire case.

The record is devoid of any evidence which might tend to prove a "likely source".

There was no attempt to offer proof that the defendant had unreported taxable income or an undisclosed source of income in an amount sufficient to explain the alleged increase in net worth nor was an attempt made to offer proof of undisclosed businesses or sources which might be capable of producing more income than was reported.

"Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient". *Holland* v. *U. S.*, 348 U.S. 121, 138. *Cf. U. S.* v. *Rully*, 143 F. Supp. 283, 285-286, *U. S.* v. *Donovan*, 142 F. Supp. 703, 707, *Thomas* v. *Commissioner*, 232 F. 2d 520, 526, *U. S.* v. *Ford*, 237 F. 2d 57, Dissenting opinion (J. Frank) 70-75.

V.

The Failure Of The Prosecution To "Track Down" Relevant Leads Furnished By The Defendant Required The Trial Judge To Determine That the Proof Was Insufficient To Go To The Jury.

This Court in *Holland* v. *U. S.*, 348 U.S. 121, has stated quite plainly what is the duty of the courts in these cases. It said, (p. 135-136):

> "While sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses—should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures, but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

Let us examine carefully what if anything was done by the Government to "track down" the leads furnished by the defendant in this case.

Preliminarily we must state our confidence that this Court intended the above rule to be strictly enforced against the Government. The strict enforcement would require every question, subject to two interpretations, to be answered in favor of the defendant, otherwise the

presumption of innocence is denied and the burden of proof is misplaced on the shoulders of the defendant.

In the case at bar the defendant, on March 26, 1954, more than two years before the trial, advised the Government that the money involved was not his but belonged to Robert Mays (App. 196). On July 28, 1955, sometime before he was indicted the defendant gave Hawley, the Assistant U. S. Attorney General the same facts (App. 201-203). In the middle of 1953 about three years before the trial, the defendant advised the Government that the money was not his (App. 222).

The Government did nothing to investigate the lead of 1953. There is no evidence that any attempt was made to substantiate or destroy the lead given to Bierman (App. 196) or to Hawley (App. 202).

Two witnesses, Wilson and Mayes were called by the prosecution in an apparent effort to overcome the defendant's statement that the money belonged to Robert Mays.

Insofar as it pertained to the point here under discussion, the testimony of these two witnesses proves more by what was not proven than by what was. For instance, Wilson was asked if he had seen receipts which were given by Irving to Mays (App. 211), he answered in the negative. Certainly this does not shift the burden on to the defendant. The Government could very well have produced innumerable witnesses who could honestly testify they did not see a receipt from Irving to Mays, but this is testimony which has no probative value.

Insofar as the 2nd witness, that is, John Mayes, the brother of the deceased Robert, is concerned, all he testified to was that he did not know the defendant Irving, and that he never got "a chance to look over the papers" (App. 219).

This is the sum total of the Government's effort to track down the leads furnished by the defendant. The absence of testimony indicating an investigation or inquiry into the leads furnished by the defendant must be taken as proof that no such investigation or inquiry was made.

It is our opinion that the case for the Government at best, is made up of a multiplication of inferences. We suggest that such a multiplication does not make a fact.

It is submitted that the Government failed to "track down" relevant leads and the case should have been taken from the jury.

VI.

A.

The Court Committed Prejudicial Error In Overruling The Defendant's Motion To Strike The Summarizing Chart And Computations (Ex. 53), Particularly In View Of The Admission By The Government Witness That The Chart And Computation Did Not Accurately Reflect Liabilities Which Were Plainly Shown In The Stipulation Previously Entered.

The Supreme Court in the *Holland* case (348 U.S. 121) mindful of the possibility of a "great danger" that the jury might make an improper assumption from figures submitted by the Government suggested that there be guarding instructions given to the jury in all cases before they take the, "various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them", to the jury room with them.

How much more dangerous it is to permit testimony of a summarizing chart to stand, which was admittedly, not a true reflection of the financial status of the defendant.

It was on the basis of this testimony that the hypothetical question summarizing the case for the Government was asked and answered.

A review of some of the testimony of summarizing witness Ruggaber (App. 223-259) a technical adviser in the Internal Revenue Service is helpful in showing that the summarizing chart, hypothetical question and answer were not a correct summation of the defendant's standing.

In order to properly show the financial status of the defendant as of December 31, 1952, it was incumbent on the Government to give the jury a complete list of all the liabilities and all the assets of the defendant. To list only an equity without listing the liability in connection therewith gives an untrue picture of the financial position of the defendant.

The witness Ruggaber who has been in the Internal Revenue Service for 33 years and since 1946 has been assisting Government Attorneys, "particularly questions where there is fraud involved and prosecution recommended for criminal invasion of taxes." (App. 225). In other words he is an expert both on taxes and court technique.

On direct examination Ruggaber (App. 223-239) had testified from Exhibit 53 (the Government's summarizing chart) that the defendant had a "net equity" of $23,542.02 on his home at 4959 S. Greenwood Avenue in Chicago (App. 234).

Since neither the summarizing chart nor the testimony of Ruggaber disclosed that the defendant on December 31, 1952 had a mortgage of $19,519.32 on his home the defendant made an attempt by cross-examination to have Ruggaber admit the omission.

Ruggaber's agility and experience in courtroom technique is amply and aptly demonstrated time and again during the cross examination.

The pertinent part of the cross examination follows:

Mr. Donnelly, (counsel for defendant) (App. 247)

Q. Exhibit 53 (the summarizing chart) at the end of 1952 shows no liabilities for moneys owing others, is that correct?

A. That is right.

The witness was then asked to read from Government Exhibit 50 which discloses a balance due on the above mentioned mortgage on December 31, 1952 of $19,519.32 (App. 250).

The questioning by Mr. Donnelly continues:

Q. Now, Mr. Ruggaber, both in paragraph 3 or the third paragraph of that Exhibit and in this last computation series that closed the Exhibit, does it or does it not clearly appear that as of December 31, 1952, Mr. Irving had a liability owing by him to others in the amount of $19,519.32?

A. Yes sir.

Q. Now, Mr. Ruggaber, you are from your testimony thoroughly familiar with the conduct and theory of net worth cases by the United States Government in income tax prosecution, is that correct?

A. Yes sir.

Q. (App. 252) But if you were preparing a statement for a bank as to this man's credit position, if he were going to borrow money, and so that they would understand his actual position, would you feel that you were adequately reflecting his financial position by showing only the equity in that house and not showing the liability?

A. I agree with you 100 percent.

Q. Just answer my question.

A. Yes, sir, I agree with you 100 per cent.

Q. You agree. Well, I asked you the question whether you thought you were accurately reflecting his position, and I would like an answer to that.

A. Adequately reflecting his position as to the equity, yes.

Q. I didn't ask you as to the equity.

A. I don't know—you asked me so much in that question, I lost track of the point.

Q. (App. 254) Will you show me on that sheet, your Exhibit No. 53, where you show the liability on this mortgage in the amount of $19,000.00?

A. I will show it to you. It is absorbed in the net equities.

Q. (App. 259) But the point I wanted to bring out is whether or not the statement in this Exhibit that he had a liability on a mortgage of $19,000 to some third party, not whether it is reflected in there but is it shown there so that anybody looking at it would know that fact?

A. Not as a specific liability under Liabilities.

From the above it can be seen that the Government's summarizing chart did not completely disclose the status of the defendant. The motion of the defendant (App. 259) states succinctly our contention hereunder and with the Court's indulgence we set that motion forth here in its entirety.

"Your Honor, on the basis of the testimony of this witness, I move to strike this Exhibit on the ground that his testimony clearly shows that this document which is the culmination of the Government's case and which they want to submit to the Jury as a summary and which is submitted to them for the purpose that they may fully understand the testimony of all witnesses and the effect of all Exhibits heretofore introduced, is shown by his own testimony not accurately to reflect liabilities that were plainly shown in the stipulation of the parties."

The above motion was summarily denied (App. 259).

B.

Submission To The Jury Of The Erroneous Summarizing Chart And Computations Constituted Error.

The error argued under "A" above was made even more grievous when it was sent into the jury room for use during the deliberations.

Had the motion to strike (App. 259) been granted this erroneous prejudicial Exhibit would not and could not be used by the jurors in discussing the guilt or innocence of the defendant.

It is pertinent in discussing the above to call to the attention of this Court the statement in the *Holland* case (348 U.S. 121, 136):

> " * * * its duty (the Governments) is not to convict, but to see that justice is done."

Surely in the interest of justice the Government should have joined in the motion to strike or in the alternative to amend the summarizing chart to the end that it would properly reflect the defendant's financial position.

CONCLUSION

It is submitted that the proof in this case does not conform to the standard established by this Court, and does not support conviction.

For this reason and because the Record is replete with serious errors affecting substantial rights, it is respectfully submitted that this Petition for Certiorari be granted.

Respectfully submitted,

DANIEL D. GLASSER,
Attorney for Petitioner.

Certificate and Proof of Service.

Daniel D. Glasser hereby certifies that he has caused service of this Petition to be made upon opposing counsel by the sending of three printed copies of the Petition for *Certiorari* and one printed copy of the Transcript of Record in the Court of Appeals to counsel of record for Respondent at their address as shown of record in that court.

DANIEL D. GLASSER,
A member of the Bar of this Court.

APPENDIX

OPINION.

In the

United States Court of Appeals

For the Seventh Circuit

No. 11849. SEPTEMBER TERM, 1956, JANUARY SESSION, 1957.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES D. IRVING,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 12, 1957.

Before FINNEGAN, LINDLEY and SWAIM, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* There is substantial evidence in this record to support the defendant Irving's conviction under § 145(b), Internal Revenue Code of 1939, 26 U. S. C. § 145(b). Numerous[1] stipulations of defense counsel coupled

[1] When arguing to the jury the defense attorney said: ". . . . we stipulated to a lot of things in this case. Frankly, in a practice of about thirty years, I have never, never stipulated to so many things as I did in this case.

I did it because I felt that it would hasten the trial, and I felt that the basic issue here was not pencils and papers and records and accountants. The question is: Did Irving get this money from Mays and from other sources he spoke about, or didn't he?" (App. Gov. Brief p. 13)

The government called John Mays, the brother of Robert Mays, deceased, and the defense did not examine John after his direct testimony. (App. 220).

with the government's evidence eliminates any question of whether the prosecution sustained its burden of proof. The judgment of conviction must be affirmed. *United States* v. *Aman*, 210 F. 2d 344, (7th Cir. 1954); *Holland* v. *United States*, 348 U. S. 121 (1954); *Spies* v. *United States*, 317 U. S. 492 (1943). In this instance the government's investigation and proof eliminates any substance for an effective argument about "leads." The short of it is that Irving reported taxable income of $8,750.00 from the Panama Finance Company, $3,524.71 from the Irving Music Company and $37,450.00 from speculations for the calendar year 1952. Defendant explained to a government agent that "speculations" were gambling "wins" and denied he had any records to support that figure. Admittedly, defendant operated a policy wheel prior to November 1951. There is absent any evidence that Irving ceased such operations after 1951. Investigations disclosed expenditures in excess of assets owned by defendant on January 1, 1952, plus all income reported, by him, as received in 1952. A revenue agent was told by Irving, or his representative, that the "bulge" in expenses of about $150,000 [*Holland* v. *United States*, 348 U. S. 121, 125 (1954); *United States* v. *Calderon*, 348 U. S. 160 (1954)], arose out of money given him by a Robert Mays to invest in a legitimate business. No receipts for that sum were produced or found and no claim has been made against Irving by Mays' estate. A government witness testified that Irving's income tax for 1952 was understated by $139,605.40.

Two other points require attention in this opinion, though we have carefully studied all other matters brought to our attention in this appeal. The defendant filed an affidavit of bias and prejudice pursuant to 28 U. S. C. § 144, as follows:

"James D. Irving, being duly sworn, deposes and says:

1. That I am the defendant in the above-entitled cause.

2. That I verily believe that the Honorable William J. Campbell, Judge of the court in which this action was commenced, and is now pending, and before whom it is to be tried, has a personal bias and prejudice against me by reason of the fact that Daniel D. Glasser is my attorney. Judge Campbell has stated his prejudice against my attorney Mr. Glasser in open court and has further stated that Mr. Glasser would never be permitted to try a case before him.

I retained Mr. Glasser to represent me in connection with the matters and things set forth in the indictment numbered as above set forth, some time before the return of the said indictment and therefore long before the case was assigned to the Honorable Judge Campbell for trial. James D. Irving, defendant."

Tucker v. *Kerner*, 186 F. 2d 79 (7th Cir. 1950) contains our delineation of statutory requirements necessary for disqualification of a trial judge. Adhering to those views necessitates rejection of defendant's argument from the face of his affidavit already quoted. In any event the Executive Committee (Appellant's App. 6) found no personal bias or prejudice against the defendant or of any adverse party. We think the commendable fairness of the district judge in referring the affidavit to the District Court's committee hardly a legalistic basis for overturning the jury's verdict.

Of equal shallowness is defendant's contention over the grand jury's life. See Rule 6(g), Federal Rules Criminal Proc., 18 U. S. C.

The judgment of the district court brought here for review is affirmed.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

ORDER OF AFFIRMANCE

On February 12th, 1957 the following order was entered in the within case:

> This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was submitted to the Court without oral argument.
>
> On consideration whereof, it is ordered and adjudged by this Court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

ORDER DENYING PETITION FOR REHEARING.

On March 14th, 1957 the following order was entered in the within case:

> It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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2. Whether the authority of the grand jury had expired at the time the indictment was returned.

3. Whether the evidence was sufficient to support the verdict.

4. Whether the trial court erred in denying petitioner's motion to strike the Government's summary of unreported income.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 145 (b).)

Judicial Code of 1948:

SEC. 144. *Bias or Prejudice of Judge.*

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the

matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

(28 U. S. C. 144.)

Federal Rules of Criminal Procedure:

Rule 6. *The Grand Jury.*

* * * * * *

(g) *Discharge and Excuse.*—A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

STATEMENT

On August 8, 1955, petitioner was indicted in the United States District Court for the Northern District of Illinois for wilful attempted evasion of the individual income taxes of himself and his wife for the

year 1952, in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indictment alleged that petitioner reported on his return a net income of $48,724.71 and a tax liability of $17,921.32, whereas he knew that his correct income was $224,994.14, upon which he owed a tax of $157,526.72. (R. 3, 13.)[1]

On September 26, 1955, petitioner filed an affidavit stating his belief that the trial judge had "a personal bias and prejudice against me by reason of the fact that Daniel D. Glasser is my attorney," and alleging that the judge had "stated his prejudice against my attorney Mr. Glasser in open court and has further stated that Mr. Glasser would never be permitted to try a case before him. * * *" (R. 14–15.) The judge referred this affidavit to the court's Executive Committee, consisting of two other judges. The Committee treated the affidavit as a motion to require the trial judge to disqualify himself under Section 144 of the Judicial Code (28 U. S. C. 144) and denied the motion on the ground that it did "not show the personal bias or prejudice" required by the statute. (R. 3, 16.)

On December 1, 1955, petitioner filed a motion to dismiss the indictment, arguing *inter alia* that the grand jury had no power to return the indictment because its term had expired. The motion was overruled. (R. 17–24.)

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[1] References to the printed record are designated "R" to indicate the Appellant's Appendix in the Court of Appeals and "GA" to indicate the Appellee's (Government's) Appendix.

After a jury trial petitioner was found guilty. (R. 27–28.) On May 28, 1956, he was sentenced to three years imprisonment. (R. 29–30.)

The evidence to support the verdict may be summarized briefly as follows:

Petitioner's 1952 reported income consisted of $8,750 in wages received from the Panama Finance Co. (a corporation formed January 31, 1952, and wholly owned by petitioner and his wife); $3,524.71 from another venture; and $37,450 listed as "Speculations", not further identified. (GA. 29–31, 36.) Taxpayer explained to the accountant who prepared his return, and later to the investigating agents, that the latter item represented income from wagers; that he had no records to support the figure; and that the amount of $37,450 was "pretty much a guess * * *." (R. 84–85, 95, 196.)

The Government's reconstruction of income, based on the net worth-expenditures method, showed that petitioner's true income for 1952 was $224,994.14, as against $48,724.71 reported. (R. 232–238, GA. 43–44.) The net worth starting point evidence consisted mainly of a signed statement furnished by petitioner to the Internal Revenue Service in February 1952 (in connection with an inquiry into his income tax returns for earlier years) showing in detail his assets and liabilities as of December 31, 1951. (R. 58, GA. 33–34.)

During the investigation in 1953 petitioner told the Treasury agents that his increased net worth represented loans to him from several individuals whose

names could not be disclosed for fear petitioner "would wind up in the alley dead." (R. 222–223.) Some months later petitioner stated that a few weeks before Christmas, 1951, he had received $150,000 in cash from one Robert Mays; that Mays had advanced this money as his share of an investment in "some legitimate enterprise;" that the transfer of funds was to be kept a secret between petitioner and Mays; that petitioner kept it in the form of cash, giving Mays two receipts, one for $50,000 and the other for $100,000; and that no one else was present when the money was paid over to petitioner. (R. 196–198.) Mays died on January 8, 1952, having been seriously ill since about November 1, 1951. (R. 207, 217–220.)

Petitioner's accountant, Wilson, was familiar with the financial affairs of Mays, not only because he had kept the records of Mays' business ventures and prepared his income tax returns, but also because he was the administrator of Mays' estate. (R. 204–207.) In his capacity of administrator, Wilson had made a search to unearth Mays' assets and liabilities and was present at the opening of all Mays' safe deposit boxes. He found no evidence of any indebtedness running from petitioner to Mays. (R. 207–211.) Moreover, petitioner never paid anything to Mays' estate on the alleged indebtedness, nor did Wilson or any other representative of the estate ever make any demand upon him for payment. (R. 211–213.) Mays' brother, who was in close touch with him during the period before his death, corroborated Wilson's testimony that no evidence of the transaction was found in the course of

the search for Mays' assets. (R. 217–219.) The known gross assets of Mays' estate totalled about $70,000. (R. 207–211, 214.)

Petitioner introduced no evidence at the trial. (R. 264.)

ARGUMENT

1. Petitioner contends (Pet. 6–10) that the trial judge should have disqualified himself on the basis of an affidavit of bias and prejudice filed against him by petitioner. The gist of the affidavit is as follows (R. 14):

> That I verily believe that the Honorable William J. Campbell, Judge of the court in which this action was commenced, and is now pending, and before whom it is to be tried, has a personal bias and prejudice against me by reason of the fact that Daniel D. Glasser is my attorney. Judge Campbell has stated his prejudice against my attorney Mr. Glasser in open court and has further stated that Mr. Glasser would never be permitted to try a case before him. * * *

The statute, Section 144 of the Judicial Code (28 U. S. C. 144), *supra*, pp. 2–3, provides that whenever a party "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein * * *." While this Court has held that such a provision may not be used by a "discontented litigant to oust a judge" because of past adverse rulings, *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 43–44, it is established that the facts stated in

an affidavit of prejudice must be accepted as true. *Berger* v. *United States,* 255 U. S. 22. The question before the trial court is whether, accepting the alleged facts as stated, they form the basis for a judgment that the judge in question will not be able to try the case fairly because of personal antagonism to the accused. *Berger* v. *United States, supra,* at pp. 35–36; *Scott* v. *Beams,* 122 F. 2d 777 (C. A. 10), certiorari denied, 315 U. S. 809; *Tucker* v. *Kerner,* 186 F. 2d 79 (C. A. 7). Although the statutory provision has been before this Court but seldom, the lower federal courts have generally held that the bias must be personal to the accused. *Price* v. *Johnston,* 125 F. 2d 806, 811–812 (C. A. 9), certiorari denied, 316 U. S. 677; *Henry* v. *Speer,* 201 Fed. 869, 871–872 (C. A. 5); *Eisler* v. *United States,* 170 F. 2d 273, 278 (C. A. D. C.); *United States* v. *Valenti,* 120 F. Supp. 80, 85 (D. N. J.). Specifically, it has been held that prior remarks with respect to a party's attorney do not suffice to uphold an affidavit of prejudice. *United States* v. *Valenti, supra,* at pp. 86–87.

Applying these tests to this case, it appears that the court below was justified in concluding that the affidavit was not sufficient. The entire weight of the affidavit, accepting its allegations as true, bore on the disposition of the court toward the petitioner's attorney. If this attitude had resulted in any prejudice to the petitioner, he would, of course, have been entitled to a new trial. Cf. *Peckham* v. *United States,* 210 F. 2d 693 (C. A. D. C.). But there is no reason for this Court to review the application of well established standards for passing upon the sufficiency of

affidavits of prejudice to the facts of this particular case.

Nor was error committed through the referral by the trial judge of the sufficiency of the affidavit to two of his fellow judges for consideration. It appears that these judges were members of what is known in the Northern District of Illinois as an Executive Committee, which was responsible for the assignment of cases. See Rule 10 (c) of the General Rules of the United States District Court for the Northern District of Illinois, and *In re Federal Facilities Realty Trust,* 140 F. Supp. 522, 524 (N. D. Ill.). It is quite common in the district courts for motions to be considered by a judge other than the one who will preside over the trial. Here the Judicial Code does not require the affidavit to be passed upon by the judge involved. Since the issue to be decided was the legal sufficiency of the facts alleged, and not whether or not they were true, it was additional assurance of impartiality for the judge accused not to make the determination. Presumably he would have disqualified himself, regardless of the sufficiency of the affidavit, if he had been conscious of actual bias or prejudice.

2. The contention (Pet. 10–12) that the indictment should have been dismissed because the term of the grand jury expired before it was returned is without substance. The grand jury was impanelled in January 1955, and the indictment was returned on August 8, 1955. (R. 3, 19.) Rule 6 (g) of the Federal Rules of Criminal Procedure (*supra,* p. 3) provides in part that "A grand jury shall serve until

discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court * * *." The Notes of the Advisory Committee on Rules include the following:

> * * * The rule continues the 18 months' maximum for the period of service of a grand jury, but provides for such service as a matter of course, unless the court terminates it at an earlier date. The matter is left in the discretion of the court, as it is under existing law. The expiration of a term of court as a time limitation is elsewhere entirely eliminated (Rule 45 (c)) and specific time limitations are substituted therefor. * * *

We submit that there is plainly no merit in petitioner's argument (Pet. 11) that the grand jury's authority ceased because it was called a grand jury for the January 1955 Term and because no motion to extend its life was made.

3. The argument (Pet. 12–21) that the evidence was insufficient to support the verdict is broken down into three parts, *viz.*, that the Government failed (a) to sustain its burden of proof generally; (b) to prove a likely source of unreported income; and (c) to track down relevant leads furnished by petitioner. None of these arguments has merit.

(a) The evidence has already been summarized (*supra*, pp. 5–7) and need not be repeated in detail. It showed that petitioner had invested or expended funds in 1952 which exceeded his reported income by

$176,269.43; that, although he undertook to make no explanation at the trial, he had told the Treasury agents during the investigation that he had received $150,000 from one Mays for investment purposes late in 1951; that petitioner never paid any part of the $150,000 to Mays' estate, nor did its administrator make any effort to collect from petitioner; and that petitioner had maintained no records to support the accuracy of the bulk of his reported income. It will be noted that, even if full credence be given to petitioner's thoroughly discredited explanation regarding the $150,000, there would remain unreported income in excess of $26,000.

(b) Equally without merit is the argument (Pet. 18) that the Government failed to prove a "likely source" (*Holland* v. *United States*, 348 U. S. 121, 138) of unreported taxable income. Assuming that such proof is necessary (but see *United States* v. *Ford*, 237 F. 2d 57 (C. A. 2), pending on certiorari, No. 794, this Term), it is clear that the Government's burden was fully met in the instant case. Petitioner operated a policy (numbers) game in 1949, 1950 and 1951. (R. 57, 87–88, 196.) There was no evidence that petitioner ceased to engage in this activity, and the jury could reasonably infer that it constituted a continuing source of income through 1952. Even aside from this, however, the proof that the bulk of petitioner's reported income arose from gambling (*supra*, p. 5) was plainly sufficient to establish a likely source. *United States* v. *Costello*, 221 F. 2d 668, 672 (C. A. 2), affirmed on other grounds, 350 U. S. 359.

(c) Nor was there a failure on the Government's part to "track down relevant leads" (*Holland* v. *United States*, 348 U. S. 121, 135–136). The only "lead" referred to by petitioner (Pet. 19–21) is his claim regarding the secret transfer of $150,000 in currency from Mays, who died shortly thereafter. Although this was hardly a lead "reasonably susceptible of being checked" (*Holland, supra*, at p. 136) the Treasury agents did everything reasonably possible to ascertain the truth of the matter. The evidence, as we have shown (*supra*, pp. 6–7), supported the conclusion implicit in the verdict, that the explanation was false.

4. There is no merit in the contention (Pet. 21–25) that the trial court erred in refusing to strike the Government's summary of petitioner's net worth increases, expenditures and alleged unreported income, and in permitting the jurors to have copies. It is well settled that summaries of this kind are admissible when based upon testimony and documents in evidence.[2] Petitioner's initial objections to the admission of the summary and to the distribution of copies to the jurors were expressly withdrawn (R. 229–231) and he is in no position to complain now. *Johnson* v. *United States*, 318 U. S. 189, 200–201.

[2] *United States* v. *Kelley*, 105 F. 2d 912, 918 (C. A. 2); *Graves* v. *United States*, 191 F. 2d 579, 584 (C. A. 10); *Bell* v. *United States*, 185 F. 2d 302 (C. A. 4), certiorari denied, 340 U. S. 930; *Hanson* v. *United States*, 186 F. 2d 61, 67 (C. A. 8); *Gendelman* v. *United States*, 191 F. 2d 993, 996–997 (C. A. 9), certiorari denied, 342 U. S. 909; cf. *Holland* v. *United States*, 348 U. S. 121, 127–128. And see *United States* v. *Johnson*, 319 U. S. 503, 519, relating to a Treasury agent's oral testimony as to such computations.

The subsequent motion to strike (R. 259) was based solely on the fact that petitioner's net equity in his home was shown as an asset on the Government's summary, as against the contention that the gross purchase price should have been shown as an asset, offset in part by a liability item showing the balance due on the mortgage. But the adoption of petitioner's suggestion as to the manner in which the amounts should have been shown could have made no change in the alleged unreported income, nor does petitioner attempt to explain how he may have been prejudiced by the Government's method of presentation. The details of the items were clearly shown on the underlying exhibit (GA. 38–39) and fully explained in the testimony (R. 249–254, 258–259), and the jury could not have been misled.[3]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
RICHARD B. BUHRMAN,
Attorney.

MAY 1957.

[3] The court cautioned the jury that the Government's summary had "no independent value" and was not binding upon them. (GA. 26.) No objection was made to the charge. (GA. 28.)

U. S. GOVERNMENT PRINTING OFFICE: 1957